year, are represented, as follows: Harvard, 93; Yale, 30; Brown, 11; Princeton, 9; Dartmouth, 8; Williams, 5; Amherst, Bowdoin, Columbia, Michigan, 4; California, Clark, Cornell University, State University of Iowa, Missouri, Rochester, Tufts, Washington & Jefferson, 3; Bates, Georgia, Hamilton, Leland Stanford, Jr., William Jewell, 2; Allegheny, Beloit, Carleton, Central, Chicago, Cornell College, Dakota Wesleyan, Dalhousie, De Pauw, Fargo, Fordham, Franklin, Georgetown College, Georgetown University, Gustavus Adolphus, Hamline, Holy Cross, University of Illinois, Iowa, Johns Hopkins, Kentucky State, Miami, Ohio Wesleyan, Oxford, Parsons, Pennsylvania, Pomona, St. Joseph's, St. Lawrence, St. Vincent's, Santa Clara, South, Syracuse, Trinity (Conn.), Trinity (N. C.), Union, Vermont, Virginia, Wake Forest, Washington, Wesleyan, Western Reserve, Western University of Pennsylvania, West Virginia, Wooster, 1. There are at present in the School eleven law school graduates, six of whom hold academic degrees also, representing the law schools of the following universities: Boston, Harvard, Illinois, Indiana, Iowa, Tennessee, George Washington, Western Reserve, Boston Y. M. C. A., West Virginia.

WHAT RULE OF DECISION SHOULD CONTROL IN INTERSTATE CONTROVERSIES. — In the Articles of Confederation provision was made for the appointment of commissioners to hear and determine controversies between the states, who were to decide the questions involved, not necessarily according to common law rules, but according to broad principles of right judgment.[1] And at the time of the adoption of the Constitution the narrowing effects of the establishment of the common law as a general rule of decision were contemplated.[2] Neither the Constitution itself, therefore, nor subsequent statutes establish the common law of England or of any state as the standard of decision for the Supreme Court in interstate controversies. But the absence of stipulated rules of decision and of forms of procedure does not appear to have embarrassed the court.[3] In the case of boundary disputes between the states, the common law of the contending states may well serve as an adequate standard of rights.[4] But in complicated questions affecting the so-called quasi-sovereign rights of the states, — in cases, for example, involving the pollution or diversion of interstate rivers, — the adequacy of common law rules seems questionable. The United States Supreme Court has accordingly developed the doctrine, supported by two recent cases, that the common law of private rights is not the measure of the rights of the states in interstate controversies.[5] *Kansas* v. *Colorado*,[6] 206 U. S. 46; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230. Georgia was granted relief in equity against a Tennessee corporation which discharged noxious gases across the state line, on the principle that, though damages might be an adequate remedy for a private person, a state is not to be required to part with its quasi-sovereign rights for damages. This idea of state quasi-sovereignty also led the court to adopt in the Kansas case a position midway between the claim of Kansas, that the common law

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[1] Art. IX.
[2] 2 Elliott, Debates, 346.
[3] See Rhode Island *v.* Mass., 12 Pet. (U. S.) 657; Missouri *v.* Illinois, 200 U. S. 496.
[4] Rhode Island *v.* Mass., *supra*. See 19 HARV. L. REV. 606.
[5] See also Missouri *v.* Illinois, *supra*.
[6] See also 21 HARV. L. REV. 47.

rule of riparian ownership should control, and the contention of Colorado, that international law should be the rule of decision.[7] The court holds, on principles as broad as those suggested in the Articles of Confederation, that equality of right and a balance of benefits should be the rule of law in interstate controversies, and suggests that the body of law which the court is building up in this manner is "interstate common law."

It is necessary, however, to employ this phrase cautiously, for "interstate common law" had, of course, no prototype antedating the formation of the Union.[8] But the conception of such a body of law is not fanciful, if simply taken to mean the principles established by the Supreme Court in its decisions of interstate disputes. In this sense it does not involve the much discussed question whether there is a common law *of* the United States as well as *in* the United States.[9] For even though it is readily admitted that a separate federal common law of private rights does not exist, the Supreme Court is not forced to apply the common law of the states in the settlement of controversies between the states. That, indeed, would frequently be impossible, as when the rules of law of the conflicting states are opposed to each other. Moreover, it would deny the quasi-sovereign character of the states. This quasi-sovereignty, however, — the fact that a state as *parens patriae* has a higher status than a private person — is so well recognized by the Supreme Court that the mere fact that a state has no pecuniary interest in a controversy does not defeat the original jurisdiction of the court.[10] The notion of a body of law applying peculiarly to interstate relations and this idea of quasi-sovereignty are interdependent. The latter justifies the former; the former is made necessary by the latter. The sanction for such law is to be found in the general language of Article III of the Constitution, which wisely provided for a flexible and progressive system of law by omitting to define the standards which should control the Supreme Court.

CLAIM OF UNCONSTITUTIONALITY BARRED BY ESTOPPEL. — The contention, not infrequently made, that a party can never be estopped from setting up unconstitutionality, is universally denied, but the treatment of the question in the cases is far from satisfactory. Our courts do not sit to revise the work of their co-ordinate department of government, the legislature. Their duty is to decide the controversy of the parties then before them. If the application of a certain statute to the case would result in a clear violation of the constitution, they will refuse to apply it. This, it would seem, is the rationale and extent of judicial power to declare legislation unconstitutional.[1] Moreover, as it is the duty of the legislature to act according to the constitution, the courts will naturally presume it has done so, and will apply the statute unless reason is shown why they should not.[2] The ques-

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[7] See 8 HARV. L. REV. 138.

[8] *Cf.* Penn *v.* Lord Baltimore, 1 Ves. 443.

[9] See Von Holst, Const. Law, 161n; 36 Am. L. Rev. 498.

[10] Missouri *v.* Illinois, 180 U. S. 208. See also Kansas *v.* Colorado, 185 U. S. 125, 142.

[1] Marbury *v.* Madison, 1 Cranch (U. S.) 137, 177, 178; Von Holst, Const. Law, 62; Cooley, Const. Lim., 7 ed., 228.

[2] See 7 HARV. L. REV. 129.